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MEMORANDUM

January 4, 1982

TO: Keith Onsdorff, Chief
Office of Enforcement

FROM: Tim Haley

SUBJECT: Ventron Decision

At the last Executive Enforcement Committee meeting I volunteered to do an analysis of the Ventron decision. The analysis is attached to this memorandum. The issues discussed are pre-act liability, piercing the corporate veil, and causation.

This decision has important implications for the Department. I suggest we discuss it at the next Executive Enforcement Committee meeting.

T.S.H.

js
Attachment

cc Assistant Commissioner Tyler
Director Giardina
Director Schiffman
David Mack
Roger Haase
Ellen Radow
Executive Enforcement Committee ✓

FACTS

F.W. Berk and Company (Berk) owned and operated a Mercury processing plant from 1929 to 1960. Berk was in default in this suit. Velsicol Chemical Corporation (Velsicol) formed and capitalized Wood Ridge Chemical Corporation (Wood Ridge) as its wholly owned subsidairy in 1960. Wood Ridge purchased Berk's assets, including the 40 acre tract on which the Mercury Plant was located. The mercury processing plant was operated by Wood Ridge between 1960 and 1974. Wood Ridge declared a land dividend of 33 acres in 1967, which was subdivided from the 40 acre tract, to Velsicol, its parent corporation. All of Wood Ridge's capital stock was sold to Ventron Corporation (Ventron) in 1968.

The other 7 acre tract, on which the mercury processing plant was located, was owned by Wood Ridge until it merged with Ventron in 1974. The plant was shut down. Machinery and equipment were sold and removed from the site and the 7 acre tract was conveyed to Robert M. and Rita W. Wolf. The Wolfs knocked down the building and built a warehouse.

The trial court found that mercury is still carried to Berry's Creek via surface water runoff. The court further found Wood Ridge to be in violation of prohibitions against discharges of hazardous and toxic substances under N.J.S.A. 23:5-28 and the Water Quality Improvement Act of 1971, N.J.S.A. 59:10-23.1, which was replaced by the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11. Based upon these findings, the trial court assessed liability for abatement of a public nuisance as defined by Statute, Alpine Borough v. Brewster, 7 N.J. 42 (1951). Liability was also assessed under the Rylands v. Fletcher, (3HFC 744 exch. 1865), and the common law principle of the strict liability in tort for unleashing a dangerous substance during nonnatural use of land. The trial court also found the Spill Compensation and Control Act not to be applicable to impose liability for discharges prior to the act's effective date.

The following is a discussion and analysis of the relevant issues on appeal.

Issue: May the Spill Compensation and Control Act be used to impose liability for discharges made prior to its effective date?

Holding: The Spill Compensation and Control Act is retroactive in

its remedy only. The act may be used to provide cleanup liability for discharges prior to the act if the discharge imposes a substantial risk of imminent danger to the public health or safety or imminent and severe damage to the environment.

Discussion: The apellate court stressed two points in finding Wood Ridge liable under the Spill Compensation and Control Act. First, the court keyed its finding on the 1980 amendment to the act. The relevant amendment, 58:10-23.11fb.(3) allows the Department to remove or arrange for the removal of hazardous substances which have been discharge prior to the (1977) effective date of the act "if such discharge poses a substantial risk of imminent damage to the public health or safety or imminent and severe damage to the environment." The court said that a specific factual finding was necessary to trigger the application of this section. In this case, no factual finding was made on the trial level. The Appellate Court exercised its original jurisdiction to decide the issue in DEP's favor.

The second salient point was the court's construction of this retroactive section. In finding no constitutional obstacle to the retroactive application of the act, the Court said:

> The discharges were wrong when made under the 1937 act, later under the 1971 act and, throughout Wood Ridge's operation of the mercury processing plant, under the common law principle of strict liability. (The Spill Compensation and Control Act) was remedial only, providing a procedure for the imposition of costs to pay for the cleanup of prior wrongful disharges.

The key then to triggering cleanups for pre-act discharges is a two step process. First, the discharge must violate a statute or common law prinicple at the time of the discharge. Second, the Department must show an imminent threat to health safety or the environment. While the Court's decision represents a major victory for the Department and the environment, it does present a few problems. It would be better for the Department if we could establish that the present effects of past dishcarges are in fact present discharges. As applied to the present case, we could say that the current runoff into Berry's Creek is in fact a present violation of the Spill Compensation and Control Act. We would then be able to use the act on its own; thereby avoiding the problems of showing a violation of another law and proving an imminent hazard.

Issue: When may the corporate veil be pierced to place liability against the principals of a corporation?

Holding: The corporate veil may be pierced when the corporation is a mere instrumentality of its parent corporation.

Discussion: Wood Ridge was formed by Velsicol to purchase Berk. The appellate court, quoting the trial court, said "even if Velsicol had not, in fact, dominated the affairs of [Wood Ridge] (and it did), it had the

ability through its 100% stock ownership to control those acts of [Wood Ridge] which might affect the public and the environment." Opinion page 14.

The court went on to note that Velsicol and Ventron could not escape liability for Wood Ridge's actions, as Wood Ridge was a mere instrumentality or alter ego of its parent corporations. The court further went on to state that the other two standards for piercing the corporate veil to impose tort liability, grossly inadequate capitalization and substantially exclusive business with the parent corporation, need not be found in a public interest case.

Obviously, this part of the decision has major ramifications for the Department. Although this decision concerned two corporations, the principle should be applied to individuals who own corporations. Imposing liability against individuals will allow us to avoid the corporate form shifting which fly-by night operators and bad actors have used to frustrate the Department. Citation of individuals should become routine practice.

Issue: Is a de minimis contribution to a pollution problem sufficient to trigger a violation of the Spill Compensation and Control Act?

Holding: A contribution which is not a substantial factor in causing the total condition is not sufficient to trigger liability under the Spill Compensation and Control Act.

Discussion: DEP attempted to show that the Wolfs had allowed contaminants to reach Berry's Creek by smashing pipes or otherwise during the construction on the property. The court stated that DEP failed to show more than a de minimis increase in pollution. The court said that since the Wolfs' actions were not a substantial factor in causing the total dangerous and toxic condition, the Wolfs were not liable under any of the statutory or common law theories of recovery.

This part of the decision is consistent with the words of the Spill Compensation and Control Act. The statute speaks in terms of strict liability. This is liability without fault. It is not liability without causation. The decision preserves our ability to impose liability absolutely on those who cause environmental problems.

The Ventron decision is an important clarification of the Spill Compensation and Control Act. We, as a Department, should look at our future allegations, who is charged, and with what they are charged in order to implement the Ventron Decision.

T. S. H.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1395-79; A-1432-79; A-1446-79;
A-1545-79

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Plaintiff-Appellant,

v.

VENTRON CORPORATION, a Massachusetts corporation; WOOD RIDGE CHEMICAL CORPORATION, a Nevada corporation; ROBERT M. WOLF & RITA W. WOLF, his wife; UNITED STATES LIFE INSURANCE COMPANY, a New York corporation, VELSICOL CHEMICAL CORPORATION and F.W. BERK AND COMPANY, INC.,

Defendants-Appellants,

and

ROVIC CONSTRUCTION CO., INC. a corporation of the State of New Jersey, by its Statutory Receiver, Joseph Keane,

Intervenor-Plaintiff,

v.

VENTRON CORPORATION, a Massachusetts corporation; WOOD RIDGE CHEMICAL CORPORATION, a Nevada corporation; VELSICOL CHEMICAL CORPORATION and F.W. BERK & CO., INC.,

Defendants,

and

MOBIL OIL CORPORATION, CHEVRON U.S.A., INC., TEXACO, INC., and EXXON COMPANY, U.S.A., foreign corporations authorized to do business in the State of New Jersey,

Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION and STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY, SPILL COMPENSATION FUND,

Argued November 10, 1981 - Decided DEC - 9 1981

Before Judges Botter, Antell and Furman.

On appeal from the Superior Court, Chancery Division, Bergen County.

Ronald P. Heksch, Deputy Attorney General, argued the cause for the appellant State of New Jersey, Department of Environmental Protection (James R. Zazzali, Attorney General, attorney; John J. Degnan, former Attorney General; Erminie L. Conley, Assistant Attorney General, of counsel; Mr. Heksch and Mary C. Jacobson, Deputy Attorney General, on the brief).

Harry R. Hill, Jr. argued the cause for the appellants, Ventron Corporation and Wood Ridge Chemical Corporation (Backes, Waldron & Hill, attorneys; Michael J. Nizolek, on the brief).

Adrian M. Foley, Jr. and John F. Neary argued the cause for the respondent Velsicol Chemical Corporation (Connell, Foley & Geiser, attorneys; Mr. Neary, on the brief).

Murry D. Brochin argued the cause for the appellants Robert M. Wolf and Rita W. Wolf (Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan, attorneys).

Barry H. Evenchick argued the cause for the appellants New Jersey Spill Compensation Fund (John J. Francis, Jr. and Richard A. Levao, on the brief; Shanley & Fisher, attorneys).

The opinion of the court was delivered by

FURMAN, J.A.D.

Interlocutory appeals and cross-appeals are brought from judgments in an action by the Department of Environmental Protection (DEP) resolving statutory and common law liability for the cleanup and removal of mercury pollution in and adjoining tide-flowed Berry's Creek in Bergen County. After a 55 day trial without a jury, the trial court determined that F.W. Berk & Company (Berk) was jointly and severally liable;

that Wood Ridge Chemical Corporation (Wood Ridge) was jointly and severally liable; that Velsicol Chemical Corporation (Velsicol) was severally liable for half the costs; that Ventron Corporation (Ventron) was severally liable for half the costs; and that Robert and Rita Wolf (Wolfs) were not liable. In addition, the trial court imposed liability against Velsicol for the surfacing of its 33 acre property adjoining Berry's Creek in order to prevent future run-off or drainage of mercury into Berry's Creek.

On their cross-claim the Wolfs were granted judgment against Ventron for fraudulent non-disclosure of mercury pollution in the sale and conveyance of a 7.1 acre property, inland from the Velsicol property and the site of a mercury processing plant from 1929 to 1974. The judgment below also set forth that the Spill Compensation Fund established under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, L. 1976, c. 141, "constitutes a source of money which is available . . . to abate problems such as the one before the Court." Both of these provisions of the judgment are also appealed.

The substantially undisputed facts are as follows. Berk owned and operated the mercury processing plant from 1929 to 1960 on a 40 acre tract west of Berry's Creek. In this litigation Berk is in default. The adjudication of its joint and several liability is not challenged on appeal.

Velsicol formed and capitalized Wood Ridge as its wholly owned subsidiary in 1960. Wood Ridge then purchased Berk's assets, including the 40 acre tract. From 1960 to 1974

Wood Ridge operated the mercury processing plant. In 1967 Wood Ridge declared a land dividend of 33 acres, subdivided from the 40 acre tract, to its parent corporation Velsicol. Velsicol has remained the owner of the 33 acre tract. It sold all the capital stock of Wood Ridge to Ventron in 1968.

The adjoining 7.1 acre tract, on which the mercury processing plant was located, was owned by Wood Ridge until its merger into Ventron in 1974. The plant was shut down, machinery and equipment were sold by Ventron to Troy Chemical Company and removed from the site, and the 7.1 acre tract was conveyed by Ventron to the Wolfs.

During the operation of the mercury processing plant by Berk and Wood Ridge, mercury flowed and drained into Berry's Creek from the industrial site via waste effluents, groundwater leaching and surface run-off. Mercury content in the waste effluents piped to the creek was as much as two to four pounds per day. Mercury-contaminated waste was dumped on both the 7.1 acre tract and the 33 acre tract. The trial court reached a finding, which was supported by credible evidence, that Velsicol accepted dumping of mercury-contaminated waste on its property until the shutdown of Wood Ridge's operations in 1974.

The trial court concluded that Berry's Creek adjoining the Velsicol property is heavily polluted and a public nuisance through the "vast cumulative effect" of mercury pollution. The concentration of mercury in the sediments of Berry's Creek for a stretch of several thousand feet is the highest reported in freshwater sediments anywhere in the world, far

exceeding acceptable standards. The toxic compound methyl mercury has been and is being formed through chemical processes. Mercury in the water of Berry's Creek is at dangerously high concentrations, particularly so during storms.

Because of the diminished oxygen in Berry's Creek fish are only present when swept in by the tide. As the result of feeding by fish off microorganisms in the sediments, there is a threat of mercury poisoning to humans who, in turn, eat the fish.

A reliable expert witness estimated the weight of mercury in the subsoil and groundwater under the 33 acre tract owned by Velsicol and the 7.1 acre tract owned by the Wolfs at 268 tons. The trial court found that mercury is still carried to Berry's Creek via surface water run-off from the Velsicol property but that DEP failed to prove present groundwater leaching of mercury into the creek.

The highest surface and subsurface concentration of mercury is on the Wolf property, formerly the site of the mercury processing plant. After acquiring title in 1974, the Wolfs demolished the five industrial buildings and built warehouses. With the approval of DEP and the Federal Environmental Protection Agency, the Wolfs excavated the upper layer of mercury-contaminated soil from the easterly portion of their property, closest to Berry's Creek, removed hundreds of thousands of cubic yards to the westerly portion and installed a containment system. Because of filling, the Velsicol property is now somewhat upgrade from

the Wolf property, between it and Berry's Creek. Whether the Wolfs' containment system will prove effective to seal off the massively contaminated upper layer of soil was not established at the time of the trial.

The trial court determined that Wood Ridge, as owner and operator of the mercury processing plant, was guilty of discharges of mercury, a hazardous and toxic substance, into a waterway of the State in violation of N.J.S.A. 23:5-28, which was first enacted in 1937, and of the Water Quality Improvement Act of 1971, N.J.S.A. 58:10-23.1 to 23.10, which was repealed by the Spill Compensation and Control Act, effective April 1, 1977. Based on that determination, the trial court, properly in our view, imposed liability against Wood Ridge for abatement of a public nuisance as defined by statute, Alpine Borough v. Brewster, 7 N.J. 42, 50 (1951), as well as under the common law principle of strict liability for unleashing a dangerous substance during non-natural use of land. Rylands v. Fletcher, 3 H. & C. 774 (Exch.1865), rev'd L.R. 1 Exch. 265 (1866), rev'd L.R. 3 H.L. 330 (1868); Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169 (Law Div. 1976); U.S. v. FMC Corp., 572 F. 2d 902 (2 Cir. 1978).

As stated by the Exchequer Chamber in Rylands v. Fletcher:

> We think the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if does not do so is prima facie answerable for all the damage which is the natural consequence of its escape.

The State had standing to maintain that common law action as the owner in fee of Berry's Creek, a tide-flowed estuary. O'Neill v. State Hwy. Dept., 50 N.J. 307 (1967).

The trial court also determined that the Spill Compensation and Control Act of 1977 was not applicable to impose liability for discharges of mercury into a waterway of the State prior to its effective date. We disagree with that determination in view of the amendment to the act, effective January 23, 1980, which establishes that the DEP may undertake the cleanup and removal of a discharge of a hazardous substance occurring prior to the effective date of the Spill Compensation and Control Act "if such discharge poses a substantial risk of imminent danger to the public health or safety or imminent and severe damage to the environment", and that all cleanup and removal costs are the joint and several liability of those responsible for such discharges.

The Spill Compensation and Control Act, N.J.S.A. 58:10-23.11g(c), as amended, provides:

> Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the department has removed or is removing pursuant to subsection b. of section 7 of this act shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs.

The cross-reference to subsection b. of section 7 is to the subsection authorizing DEP cleanup and removal of hazardous substances which were discharged prior to the effective date of the act.

Discharges are defined in the act, N.J.S.A. 58:10-23.11b(h), as:

> . . . any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substance into the waters of the State or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State.

There is no constitutional inhibition against retroactive application of the 1980 amendment to the Spill Compensation and Control Act to impose liability against Wood Ridge for its prior discharges of mercury into a waterway of the State, directly via waste effluents and indirectly via groundwater leaching and surface water run-off as the result of its dumping mercury-contaminated waste on the industrial site. The discharges were wrongful when made under the 1937 act, later under the 1971 act and, throughout Wood Ridge's operation of the mercury processing plant, under the common law principle of strict liability. The 1980 amendment did not create a new substantive liability. It was remedial only, providing a procedure for the imposition of costs to pay for the cleanup of prior wrongful discharges.

According to Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 381 (1954), which upheld the retroactive application of the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 et seq.:

> The general rule is that statutes are to be deemed operative in futuro only; but, absent a clear indication of a legislative intent contra, a remedial and procedural statute is ordinarily applicable "to procedural steps in pending actions," and is given retrospective effect "insofar as the statute provides a change in the form of remedy or provides a new remedy for an existing wrong. * * * Changes of procedure - i.e. of the form of remedies - are said to constitute an exception, but that exception does not reach a case where before the statute there was no remedy whatever." Shielcrawt v. Moffett, 294 N.Y. 180, 61 N.E. 2d 435, 159 A.L.R. 971 (Ct. App. 1945).

The Pennsylvania Supreme Court has sustained the constitutionality of the application of the Clean Streams Act to impose liability to pay the costs of cleanup and removal of present pollution which was caused by acts occurring prior to the effective date of the act. National Wood Preservers v. Com., 489 Pa. 221, 414 A. 2d 37 (Sup. Ct. 1980); Commonwealth v. Barnes & Tucker Co. (I), 455 Pa. 392, 319 A. 2d 871 (Sup. Ct. 1974); Commonwealth v. Barnes & Tucker Co. (II), 472 Pa. 115, 371 A. 2d 461 (Sup. Ct. 1977).

The issue of strict liability under the Spill Compensation and Control Act was adjudicated below, substantively but not procedurally. Wood Ridge was found to have dumped or otherwise emitted mercury, a hazardous substance, into Berry's Creek, a waterway of the State, and onto both the 33 acre and 7.1 acre tracts, from which mercury flowed or drained into Berry's Creek.

No factual finding was made that the condition existing in Berry's Creek poses a substantial risk of imminent danger to the public health or safety or imminent and severe damage

to the environment warranting cleanup and removal under the 1980 amendment. But evidence was adduced on both sides of that fact question, which was fairly in issue before the trial court. In recognizing the grave danger to the environment, expert opinion on behalf of defendants did not significantly differ from expert opinion on behalf of DEP. We exercise our original jurisdiction under R. 2:10-5 to reach that factual finding, in view of the overwhelming evidence of mercury pollution in the sediments and waters of Berry's Creek and its substantial and imminent threat to the environment, to marine life and to human health and safety.

The trial court fixed joint and several liability against Wood Ridge, applying both statutory law preceding the Spill Compensation and Control Act and common law. Under the 1980 amendment to the latter act, which established its retroactive application to prior discharges of hazardous substances, we hold that Wood Ridge also is jointly and severally liable pursuant to N.J.S.A. 58:10-23.11g(c).

No apportionment between Berk and Wood Ridge of the cost of cleanup and removal of mercury contaminants in Berry's Creek is calculable on the evidence. The total hazardous condition was found by the trial court to be attributable in part to mercury discharges by Berk from 1929 to 1960 and in part to mercury discharges by Wood Ridge from 1960 to 1974. Under general tort principles, damages for a total injury or loss are assessable against each of two or more tortfeasors whose wrong was a substantial factor in proximately causing injury or loss, whenever

the total injury or loss cannot be subdivided and liability for its several parts attributed and allocated to individual tortfeasors. Hill v. Macomber, 103 N.J. Super. 127 (App. Div. 1968); Prosser, Law of Torts, (4th ed. 1971) §52 at 313.

That general principle of tort damages is applicable, both in assessing damages for strict tort liability in accordance with Rylands v. Fletcher and, by analogy, in fixing joint and several liability for cleanup and removal costs under N.J.S.A. 58:10-23.11g(c). We affirm the adjudication below of joint and several liability against Wood Ridge for all cleanup and removal costs of mercury pollution in Berry's Creek.

The trial court held that Ventron was severally liable for half the cleanup and removal costs only, equally apportioning liability between Velsicol and Ventron based, apparently, on the number of years when each was parent corporation of Wood Ridge during the latter's ownership and operation of the mercury processing plant.

However, we hold that the trial court erred in limiting Ventron's liability to several liability for half the cleanup and removal costs only. Wood Ridge merged into Ventron in 1974. Ventron assumed all Wood Ridge's liabilities, both expressly and under controlling corporation law, N.J.S.A. 14:10-6(e), including liability for prior mercury discharges into Berry's Creek.

Ventron urges reversible error in the admission of the expert testimony of Dr. Jack McCormick on behalf of DEP,

because it had previously retained him in connection with this litigation. It relies on the attorney-client privilege and on R. 4:10-2(d)(3).

Dr. McCormick's work for Ventron in testing and analysis of mercury contamination in Berry's Creek was, according to his agreement with Ventron, "not to be considered confidential." Dr. McCormick's subsequent investigation for DEP was independent and separately paid for. There was no indication or disclosure of any confidential admission by Ventron to Dr. McCormick for the purpose of his advising Ventron preparatory to trial. DEP notified Ventron that it had retained Dr. McCormick four months prior to any objection by Ventron. Meanwhile Dr. McCormick had completed his investigation for DEP.

Under the circumstances, the exclusion of the testimony of Dr. McCormick, a recognized preeminent expert in environmental and ecological engineering, would have been prejudicial to DEP. We agree with the trial court that his testimony was not shielded by the attorney-client privilege nor under R. 4:10-2(d)(3), in the absence of any showing of breach of an exclusive agency or other confidential relationship or of fundamental unfairness.

Ventron also urges an estoppel against DEP because of its cooperative efforts to combat mercury pollution by Wood Ridge. In 1968 Ventron engaged Metcalf & Eddy, Inc. to make a study of mercury contamination in the waste effluents. In advance of

any directive or order by DEP, it instituted treatment of the waste effluents, reducing significantly their mercury content. It participated in soil and groundwater test sampling.

DEP granted no permit or formal approval to Ventron for Wood Ridge's waste effluent treatment system. At least from 1970 on, DEP communicated regularly its concern over mercury pollution and its dissatisfaction with the attempts to curb further discharges. Estoppel as a defense should not be applied against the State except to prevent "manifest wrong or injustice." In re Allstate Ins. Co., 179 N.J. Super. 581, 593 (App. Div. 1981). We do not apply estoppel against DEP on this record. Thus, we hold that Ventron is jointly and severally liable, based upon its assumption of Wood Ridge's liabilities, for all cleanup and removal costs of mercury pollution in Berry's Creek.

The trial judge also held that Velsicol was severally liable for half the cleanup and removal costs only. Nevertheless, his findings that Velsicol had knowledge of and accepted dumping of mercury-contaminated waste on its 33 acre tract after acquiring title in 1967 and that there were past and are current discharges of mercury in surface water run-offs from the Velsicol tract to Berry's Creek warrant imposition of joint and several liability against Velsicol under the Spill Compensation and Control Act, premised upon its responsibility for both past and current mercury discharges which were a substantial factor in the total mercury pollution of Berry's Creek.

In addition, the trial court pierced the corporate veil to impose liability against Velsicol for the wrongful discharges of Wood Ridge, its subsidiary corporation, from 1960 to 1968. The trial judge set forth factual findings, which were supported by adequate credible evidence in the record, and his conclusion, as follows:

> . . . One must, in a public interest case, examine the nature of the business, the ability to control and the morality or immorality of a failure on the part of the parent company to act.
>
> Velsicol formed WRCC [Wood Ridge] to purchase the Berk operation in 1960. Berk was polluting. WRCC continued to pollute, Velsiocl may not have known the consequences of the actions of WRCC but it did know, or should have known that chemical mercurial wastes were being discharged. Even if Velsicol had not, in fact, dominated the affairs of WRCC (and it did), it had the ability through its 100% stock ownership to control those acts of WRCC which might affect the public and the environment.
>
> WRCC was created for the sole purpose of acquiring the assets of Berk and continuing the business. Velsicol was in a related and compatible business. Velsicol personnel, directors, and officers were constantly involved in the day-to-day operation of the business of WRCC. Quality control of WRCC was handled by Velsicol. In general, WRCC was treated as a division of Velsicol.
>
> Velsicol's goal was economic gain. It used WRCC for that purpose. It must take the responsibility for the risks that accompany a business venture with environmental damage potential.

That conclusion is in accordance with Mueller v. Seaboard Commercial Corp., 5 N.J. 28, 34-35 (1950), which established that, where "the affairs [of a wholly owned subsidiary corporation] are so organized and conducted as to make

it a mere instrumentality" of its parent corporation, its separate corporate entity will be disregarded in order to prevent injustice.

Also corroborating Wood Ridge's relationship as a mere instrumentality or alter ego of Velsicol was the undisputed evidence that Velsicol in 1967 took title to the 33 acre tract without consideration, as a land dividend from Wood Ridge, and in 1968 sold all the capital stock of Wood Ridge to Ventron. Profits derived from Wood Ridge's operation of the mercury processing plant were reaped by Velsicol.

In our view it is immaterial that two of the factors cited as determinative of a parent corporation's liability for a wholly owned subsidiary's torts, Annotation, "Torts of Subsidiary", 7 A.L.R. 3d 1343 (1966), were not present: grossly inadequate capitalization and substantially exclusive business with the parent corporation.

Under the factual circumstances found by the trial court, as supplemented by other undisputed evidence, the separate corporate form of Wood Ridge, unless pierced, might be a shield behind which Velsicol would be immune from liability for operations which it substantially controlled and from which it exclusively profited, resulting in massive mercury pollution to the public detriment and peril. We sustain the trial court in piercing Wood Ridge's corporate veil.

Velsicol argues, finally, that DEP should be estopped to proceed against it because Wood Ridge complied with then

prevailing industry standards and DEP never brought any enforcement action against it during its operation of the mercury processing plant from 1960 to 1968; that it should be released from any liability because of Ventron's assumption of Wood Ridge's liabilities upon the merger in 1974; and that the statute of limitations, N.J.S.A. 2A:14-1 and 10, is a bar.

Estoppel is unavailable factually and legally in favor of Velsicol on this record as it is unavailable in favor of Ventron. Upon Wood Ridge's merger into Ventron, Ventron did not assume Velsicol's liabilities; it assumed only Wood Ridge's liabilities. N.J.S.A. 2A:14-1 and 10 are not by their terms applicable against the State expressly or by necessary implication. Veterans Loan Authority v. Wilk, 61 N.J. Super. 65, 70 (App. Div. 1960).

We hold that Velsicol is jointly and severally liable for all cleanup and removal costs of mercury pollution in Berry's Creek and for surfacing of its 33 acre tract to prevent further mercury discharges by surface water run-off into Berry's Creek.

DEP, in turn, appeals from the holding of the trial court exonerating the Wolfs from any liability for mercury pollution under both applicable statutes and common law.

The trial court concluded that DEP had failed to prove that the Wolfs, by smashing pipes or otherwise, allowed mercury contaminants to reach Berry's Creek by run-off or drainage during demolition of the industrial buildings on the

7.1 acre tract, so as to add more than a de minimis increment to the total mercury pollution of Berry's Creek. The trial court also rejected any finding that there is current groundwater leaching of mercury from the Wolf tract or that the containment system installed by the Wolfs is not effective, in combination with the artificial land barrier between the Wolf tract and Berry's Creek.

DEP's only other theory of liability against the Wolfs is that their property is a statutory or common law nuisance because of mercury contamination. But the Wolfs have never operated a mercury processing plant on the site nor, according to the proofs, dumped mercury. We share the trial court's view that any increment from the Wolfs' property to the mercury pollution in Berry's Creek during their ownership and prior to installation of the containment system was de minimis and, therefore, not a substantial factor in proximately causing the total dangerous and toxic condition. Accordingly, we affirm the dismissal of DEP's action against the Wolfs to impose liability for the costs of cleanup and removal of mercury pollution in Berry's Creek.

Ventron appeals from the judgment in the Wolfs' favor fixing liability on their cross-claim for fraudulent non-disclosure in the sale and conveyance of the 7.1 acre tract from Ventron to the Wolfs in 1974. The Wolfs cross-appeal from limitations on their ultimate damage recovery which are specified in the trial court's opinion and incorporated by

reference in its judgment.

The trial court found in accordance with credible evidence that Ventron had prior knowledge of a latent defect, gross mercury pollution in the soil, but intentionally failed to disclose it to the Wolfs, as attested by Ventron's supplying other data but not the Metcalf & Eddy report to the Wolfs; and that the Wolfs reasonably relied on the non-disclosure to their detriment, being forced by DEP to install the containment system. See Weintraub v. Krobatsch, 64 N.J. 445 (1974).

Ventron urges that caveat emptor should apply, that Mr. Wolf was an experienced real estate developer and that the Wolfs were on notice about two weeks prior to the title closing from the State Department of Labor that the industrial buildings on the site contained hazardous chemicals. But the non-disclosure was of latent, not patent, defects, and the notice of hazardous chemicals within and adhering as residue to the industrial buildings did not put the Wolfs on notice of surface and subsurface contaminants. Accordingly, caveat emptor should not apply. Weintraub v. Krobatsch, supra. We affirm the judgment of liability in favor of the Wolfs against Ventron for fraudulent non-disclosure.

However, we disagree with the trial court's opinion insofar as it prescribes the limits of damages which the Wolfs may be awarded on their cross-claim. At this stage of the litigation, no proof of damages has been adduced. We agree that the cost of the containment system may be recoverable, as well as the

legal fees incurred by the Wolfs in defense of the action brought against them by DEP. But the Wolfs' recovery should include any proven diminution in the fair market value of the premises below the purchase price because of the non-disclosed mercury contamination, specifically any proven diminution in excess of the cost of the containment system, for example, reflecting a ready, willing and able buyer's concern over contingent future liability under the Spill Compensation and Control Act.

Other issues raised on this appeal involve the Spill Compensation Fund. Contrary to the judgment below, the Fund may not make payments for costs of cleanup and removal of mercury pollution in Berry's Creek unless the administrator of the Fund determines that "adequate funds from another source are not or will not be available," N.J.S.A. 58:10-23.11f(e).

Velsicol and Ventron challenge the dismissal of their claims for indemnification from the Fund. Clearly under the act, entities responsible for discharges of nazardous substances are not entitled to indemnification from the Fund, N.J.S.A. 58:10-23.11g(c). We affirm the dismissal of the Velsicol and Ventron claims for indemnification.

The trial court entered a supplemental Procedural Order Involving Remedy, subsequent to its judgment, which was appealed from by Velsicol and Ventron. The proposed future course of this litigation prescribed in that order is that DEP prepare a plan for cleanup and removal of mercury pollution

in Berry's Creek and submit it for approval to the United States Army Corps of Engineers, which has jurisdiction because Berry's Creek is a navigable waterway. The costs involved would be borne initially by DEP, but imposed ultimately against the defendants subject to liability as part of the over-all costs of cleanup and removal. We agree to that extent with the Procedural Order Involving Remedy.

At oral argument before us, DEP stipulated that any defendant subject to liability would be entitled to a plenary hearing on the cleanup and removal plan and its costs, subsequent to Army Corps of Engineers' approval. The Procedural Order Involving Remedy should be modified to so provide.

The trial court also ordered future monitoring of Berry's Creek at the initial expense of DEP. Both Velsicol and Ventron were ordered to post cash or a surety bond in the amount of $1,000,000 for "any future remedial measures and for monitoring which may be necessitated after the initial cleanup of Berry's Creek and surfacing of the Velsicol tract." The trial court provided for a monitoring period of one year after which, if no further mercury pollution in prohibited concentrations occurred in Berry's Creek, Velsicol and Ventron were to be released from any further liability.

We affirm the provisions for future monitoring at the initial expense of DEP and for the posting of cash or a surety bond in the amount of $1,000,000 both by Velsicol and Ventron. Taking the view that future liability should not be

resolved at this stage of the litigation, we set aside the provision for the contingent release of Velsicol and Ventron after one year's future monitoring.

In keeping with the foregoing, we modify the judgment on liability to impose joint and several liability against both Velsicol and Ventron for the costs of cleanup and removal of mercury pollution in Berry's Creek; to set aside the limitation on damages to be awarded to the Wolfs on their cross claim against Ventron, except as limited herein; to set aside the provision that the Spill Compensation Fund is liable forthwith; and to set aside the provision for the contingent release of Velsicol and Ventron after one year's future monitoring. We otherwise affirm the judgment on liability.

We supplement the Procedural Order Involving Remedy to provide that any defendant subject to liability is entitled to a plenary hearing on the plan for cleanup and removal of mercury pollution in Berry's Creek and its costs, subsequent to Army Corps of Engineers' approval of the plan. We otherwise affirm the Procedural Order Involving Remedy.

We remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

A TRUE COPY

Elizabeth K. Coughlin

Clerk

file: VENTRON

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized.)

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION V. VENTRON CORPORATION, ET AL. (A-50/51)

Argued January 10, 1983 -- Decided July 21, 1983

POLLOCK, J., writing for an unanimous Court.

This appeal concerns the responsibility of various corporations for the cost of cleanup and removal of mercury pollution seeping from a 40-acre tract into Berry's Creek in the Meadowlands.

From 1929 to 1960 F.W. Berk and Co., Inc., operated a mercury processing plant on this land, dumping untreated waste. In 1960 Berk sold its assets to Wood Ridge Chemical Company, a wholly-owned subsidiary of Velsicol Chemical Corporation. Wood Ridge was created by Velsicol specifically to operate the processing plant.

In 1967 Wood Ridge subdivided the land, giving 33 acres to Velsicol. Velsicol, in turn, continued to permit dumping from the plant on that land.

In 1968 Velsicol sold Wood Ridge to the Ventron Corporation. Ventron commissioned a study of the effects of mercury on the land and constructed an enclosure in the waterway to aid in monitoring the discharges from the plant.

In 1970 the United States Environmental Protection Agency (EPA) tested Wood Ridge's waste water. The tests showed two to four pounds of mercury being dumped into Berry's Creek each day. Later that year, Wood Ridge installed a treatment system that abated, but did not entirely stop, the flow of mercury.

In 1974 Wood Ridge merged into Ventron. Ventron assumed the liabilities and obligations of Wood Ridge. Ventron halted the operation of the plant and sold the movable assets to Troy Chemical Company.

On May 7, 1974 Ventron conveyed the 7.1 acres of land containing the plant to Robert M. and Rita W. Wolf. The Wolfs planned to demolish the plant and build a warehousing facility. During the demolition, mercury contaminated water was used to wet down the plant. DEP learned of this and directed the halting of demolition pending adequate removal and containment of the contamination. DEP proposed a containment plan, but the Wolfs used another plan and proceeded with their project. DEP then filed this suit.

The trial court found that each operator of the plant had contributed to the mercury pollution making them liable for damages from a public nuisance and for conducting an abnormal activity. Ventron's merger with Wood Ridge made it liable as well.

The trial court also found that Ventron had fraudulently concealed material facts about the pollution from the Wolfs in 1974. Damages were limited to the cost of containment and abatement of the pollution. Counsel fees were also awarded to the Wolfs to reimburse them for their successful defense against the DEP's action.

While the case was on appeal, the Legislature amended the 1977 Spill Act to make it impose retroactive strict liability for hazardous waste dumping. The Appellate Division generally affirmed the trial court but applied the amendment to the Spill Act to hold Wood Ridge, Velsicol and Ventron jointly and severally liable, retroactively. The Appellate Division also provided that the Spill Fund could not be used to pay for the cleanup if other sources were available.

The Supreme Court granted certification solely on the questions of the retroactive application of the Spill Act, the liability of Velsicol for the removal of mercury pollution from Berry's Creek, and the liability, including costs and counsel fees, of Ventron to the Wolfs for fraudulent non-disclosure.

HELD: The amendment to the Spill Act that imposes retroactive liability is valid. Velsicol is liable for the removal of the mercury pollution under the Spill Act because it permitted Wood Ridge, its subsidiary, to dump mercury from 1960 to 1968 on the 33 acres Velsicol owned. The Wolfs are not entitled to counsel fees because of the absence of any statute, court rule or contract authorizing recovery of those expenses.

1. Those who use, or permit others to use, land for the conduct of abnormally dangerous activities are strictly liable for the resulting damages. The disposal of mercury in the Meadowlands imposes liability without fault on the landowners. Berk, Wood Ridge, Velsicol and Ventron are all individually and jointly liable under common-law principles for the abatement of the nuisance and damage. (pp. 12-22)

2. The chemical companies are also liable under the retroactive application of the Spill Act. The Legislature has the power to make remedial civil legislation retroactive and, in this case, has clearly expressed the intent to do so. (pp. 22-31)

3. Although the lower courts found Velsicol liable for the actions of Wood Ridge, its wholly-owned subsidiary, by "piercing the corporate veil," it would be inappropriate to do so applying tradition common-law doctrine. Nonetheless, Velsicol is liable under the Spill Act for permitting Wood Ridge to dump mercury on its land from 1960-1968. (pp. 32-37)

4. The Court agrees with the findings of the trial court that Ventron knew of the latent defect to the land (the mercury pollution) but fraudulently failed to disclose that defect to the Wolfs prior to their purchase in 1974. In the absence of authorization by a statute, court rule or contract, however, the damages the Wolfs may recover may not include counsel fees. (pp. 37-39)

The judgment of the Appellate Division, as modified, is AFFIRMED.

JUSTICES CLIFFORD, SCHREIBER, HANDLER and GARIBALDI join in JUSTICE POLLOCK'S opinion.

CHIEF JUSTICE WILENTZ and JUSTICE O'HERN did not participate.

SUPREME COURT OF NEW JERSEY

No. A-50/51. September Term 1982

On appeal from .....

On certification to Appellate Division, Superior Court

STATE OF NEW JERSEY, etc.,
Plaintiff-Respondent,
v.
VENTRON CORPORATION, etc., et al.,
Defendants-Appellants,
and
ROBERT M. WOLF, et al.,
Defendants-Respondents,
and
UNITED STATES LIFE INSURANCE COMPANY, etc., et al.,
Defendants.

(and other related matters)

Decided July 21, 1983

Justice Clifford Presiding

Opinion by Justice Pollock

Dissenting/Concurring opinion by .....

CHECKLIST	Affirm	Reverse	Modify	Affirmed as Modified
Chief Justice Wilentz	-------	-------	-------	----------
Justice Clifford				X
Justice Schreiber				X
Justice Handler				X
Justice Pollock				X
Justice O'Hern	-------	-------	-------	----------
Justice Garibaldi				X
Totals				5

SUPREME COURT OF NEW JERSEY
A-50/51 September Term 1982

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff-Respondent,

v.

VENTRON CORPORATION, a Massachusetts corporation; WOOD RIDGE CHEMICAL CORPORATION, a Nevada corporation and VELSICOL CHEMICAL CORPORATION,

Defendants-Appellants,

and

ROBERT M. WOLF & RITA W. WOLF, his wife,

Defendants-Respondents,

and

UNITED STATES LIFE INSURANCE COMPANY, a New York corporation and F.W. BERK AND COMPANY, INC.,

Defendants,

and

ROVIC CONSTRUCTION CO., INC., a corporation of the State of New Jersey, by its Statutory Receiver, Joseph Keane,

Intervenor-Plaintiff,

v.

VENTRON CORPORATION, a Massachusetts corporation; WOOD RIDGE CHEMICAL CORPORATION, a Nevada corporation;

VELSICOL CHEMICAL CORPORATION and F.W. BERK & CO., INC.,

Defendants,

and

MOBIL OIL CORPORATION, CHEVRON U.S.A., INC., TEXACO, INC. and EXXON COMPANY, U.S.A., foreign corporations authorized to do business in the State of New Jersey,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION and STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, SPILL COMPENSATION FUND,

Defendants.

Argued January 10, 1983 -- Decided July 21, 1983

On certification to the Superior Court, Appellate Division, whose opinion is reported at 182 N.J. Super. 210 (1982).

Harry R. Hill, Jr., argued the cause for appellants Ventron Corporation, etc., et al. (Backes, Waldron & Hill, attorneys; Michael J. Nizolek, on the brief).

Adrian M. Foley, Jr., argued the cause for appellant Velsicol Chemical Corporation (Connell, Foley & Geiser, attorneys; Mr. Foley and John F. Neary, of counsel; Mr. Neary, on the briefs).

Murry D. Brochin argued the cause for respondents Robert M. Wolf, et al. (Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan, attorneys; Deanne Wilson Plank, on the brief).

Ronald P. Heksch, Deputy Attorney General, argued the cause for respondent State of New Jersey, etc. (Irwin

I. Kimmelman, Attorney General of New Jersey, attorney; Michael R. Cole, Assistant Attorney General, of counsel).

Barry H. Evenchick, Special Counsel, submitted a letter in lieu of brief on behalf of State of New Jersey, Department of the Treasury, Spill Compensation Fund.

The opinion of the Court was delivered by

POLLOCK, J.

This appeal concerns the responsibility of various corporations for the cost of the cleanup and removal of mercury pollution seeping from a forty-acre tract of land into Berry's Creek, a tidal estuary of the Hackensack River that flows through the Meadowlands. The plaintiff is the State of New Jersey, Department of Environmental Protection (DEP); the primary defendants are Velsicol Chemical Corporation (Velsicol), its former subsidiary, Wood Ridge Chemical Corporation (Wood Ridge), and Ventron Corporation (Ventron), into which Wood Ridge was merged. Other defendants are F.W. Berk and Company, Inc. (Berk), which no longer exists, United States Life Insurance Company, which was dismissed by the lower courts in an unappealed judgment, and Robert M. and Rita W. Wolf (the Wolfs), who purchased part of the polluted property from Ventron.

Beneath its surface, the tract is saturated by an estimated 268 tons of toxic waste, primarily mercury. For a stretch of

several thousand feet, the concentration of mercury in Berry's Creek is the highest found in fresh water sediments in the world. The waters of the creek are contaminated by the compound methyl mercury, which continues to be released as the mercury interacts with other elements. Due to depleted oxygen levels, fish no longer inhabit Berry's Creek, but are present only when swept in by the tide and, thus, irreversibly toxified.

The contamination at Berry's Creek results from mercury processing operations carried on at the site for almost fifty years. In March, 1976, DEP filed a complaint against Ventron, Wood Ridge, Velsicol, Berk, and the Wolfs, charging them with violating the "New Jersey Water Quality Improvement Act of 1971," N.J.S.A. 58:10-23.1 to -23.10, and N.J.S.A. 23:5-28, and further, with creating or maintaining a nuisance. The defendants cross-claimed against each other; Velsicol and Ventron counterclaimed against DEP, which amended its complaint to allege the violation of the "Spill Compensation and Control Act" (Spill Act), N.J.S.A. 58:10-23.11 to 23.11z (repealing N.J.S.A. 58:10-23.1 to -23.10), enacted in 1977. The Spill Compensation Fund (Fund), created by the Spill Act to provide funds to abate toxic nuisances, N.J.S.A. 58:10-23.11i, intervened.

Because of issues related to the liability of the Fund, a number of its contributors (Mobil Oil Corporation; Chevron

U.S.A., Inc.; Texaco, Inc.; and Exxon Company, U.S.A.) filed a complaint, later consolidated with the present action, seeking a declaratory judgment that the Spill Act not be retroactively applied to discharges of toxic wastes occurring before the effective date of the act.

After a fifty-five-day trial, the trial court determined that Perk and Wood Ridge were jointly liable for the cleanup and removal of the mercury; that Velsicol and Ventron were severally liable for half of the costs; that the Wolfs were not liable; and that, while the Spill Act liability provisions did not apply retroactively, monies from the Fund should be made available. The trial court also granted judgment in favor of the Wolfs on their cross-claim against Ventron for fraudulent nondisclosure of mercury pollution in the sale of part of the tract. That judgment included an award of costs and counsel fees incurred by the Wolfs in their defense of the DEP action. Following the entry of judgment, the trial court entered a "Procedural Order Involving Remedy," which approved for submission to the United States Army Corps of Engineers the DEP plan for the cleanup of Berry's Creek.

The Appellate Division substantially affirmed the judgment, but modified it in several respects, including the imposition of joint and several liability on Ventron and Velsicol for all costs

incurred in the cleanup and removal of the mercury pollution in Berry's Creek. 182 N.J. Super. 210, 224-26 (1981). Because of an amendment to the Spill Act after the trial, the Appellate Division further modified the judgment by imposing retroactive liability under the act on Wood Ridge, Velsicol, and Ventron. Id. at 219-22. Furthermore, the Appellate Division precluded payments from the Fund if other sources were available to pay for the cleanup, id. at 228, and approved the future monitoring of Berry's Creek at the expense of Velsicol and Ventron. Id. at 229.

We granted certification to consider the retroactive application of the Spill Act, the liability of Velsicol for the removal of mercury pollution in Berry's Creek, and the liability, including costs and counsel fees, of Ventron to the Wolfs for fraudulent non-disclosure. 91 N.J. 195 (1982). Thereafter we denied motions by Wood Ridge, Velsicol, and Ventron to stay the enforcement of the judgment. Except for reversing the award of counsel fees to the Wolfs, we affirm the judgment of the Appellate Division.

I

From 1929 to 1960, first as lessee and then as owner of the entire forty-acre tract, Berk operated a mercury processing plant, dumping untreated waste material and allowing

mercury-laden effluent to drain on the tract. Berk continued uninterrupted operations until 1960, at which time it sold its assets to Wood Ridge and ceased its corporate existence.

In 1960, Velsicol formed Wood Ridge as a wholly-owned subsidiary for the sole purpose of purchasing Berk's assets and operating the mercury processing plant. In 1967, Wood Ridge subdivided the tract and declared a thirty-three-acre land dividend to Velsicol, which continued to permit Wood Ridge to dump material on the thirty-three acres. As a Velsicol subsidiary, Wood Ridge continued to operate the processing plant on the 7.1-acre tract from 1960 to 1968, when Velsicol sold Wood Ridge to Ventron.

Although Velsicol created Wood Ridge as a separate corporate entity, the trial court found that Velsicol treated it not as an independent subsidiary, but as a division. From the time of Wood Ridge's incorporation until the sale of its capital stock to Ventron, Velsicol owned 100% of the Wood Ridge stock. All directors of Wood Ridge were officers of Velsicol, and the Wood Ridge board of directors met monthly in the Velsicol offices in Chicago. At the meetings, the board not only reviewed financial statements, products development, and public relations, but also the details of the daily operations of Wood Ridge. For example, the Wood Ridge board considered in detail personnel practices,

sales efforts, and production. Velsicol arranged for insurance coverage, accounting, and credit approvals for Wood Ridge. Without spelling out all the details, we find that the record amply supports the conclusion of the trial court that "Velsicol personnel, directors, and officers were constantly involved in the day-to-day operations of the business of [Wood Ridge]."

In 1968, Velsicol sold 100% of the Wood Ridge stock to Ventron, which began to consider a course of treatment for plant wastes. Until this time, the waste had been allowed to course over the land through open drainage ditches. In March 1968, Ventron engaged the firm of Metcalf & Eddy to study the effects of mercury on the land, and three months later, Ventron constructed a weir to aid in monitoring the effluent.

Ventron's action was consistent with a heightened sensitivity in the 1960's to pollution problems. Starting in the mid-1960's, DEP began testing effluent on the tract, but did not take any action against Wood Ridge. The trial court found, in fact, that the defendants were not liable under intentional tort or negligence theories.

Nonetheless, in 1970, the contamination at Berry's Creek came to the attention of the United States Environmental Protection Agency (EPA), which conducted a test of Wood Ridge's waste water.

The tests indicated that the effluent carried two to four pounds of mercury into Berry's Creek each day. Later that year, Wood Ridge installed a waste treatment system that abated, but did not altogether halt, the flow of mercury into the creek. The operations of the plant continued until 1974, at which time Wood Ridge merged into Ventron. Consistent with N.J.S.A. 14A:10-6(e), the certificate of ownership and merger provided that Ventron would assume the liabilities and obligations of Wood Ridge. Ventron terminated the plant operations and sold the movable operating assets to Troy Chemical Company, not a party to these proceedings.

On February 5, 1974, Wood Ridge granted to Robert Wolf, a commercial real estate developer, an option to purchase the 7.1-acre tract on which the plant was located, and on May 7, 1974, Ventron conveyed the tract to the Wolfs. The Wolfs planned to demolish the plant and construct a warehousing facility. In the course of the demolition, mercury-contaminated water was used to wet down the structures and allowed to run into the creek. The problem came to the attention of DEP, which ordered a halt to the demolition, pending adequate removal or containment of the contamination. DEP proposed a containment plan, but the Wolfs implemented another plan and proceeded with their project. DEP then instituted this action.

Although Wolf knew he was buying from a chemical company land that had been the site of a mercury processing plant, Ventron knew other material facts that it did not disclose to the Wolfs. Ventron knew that the site was a man-made mercury mine. From a study conducted by Metcalf & Eddy at Ventron's request in 1972, Ventron knew the mercury content of the soil. Although the soil and water adjacent to the plant were still contaminated in 1974, that fact was not readily observable to the Wolfs, and Ventron intentionally failed to advise the Wolfs of the condition of the site and to provide them with the relevant part of the Metcalf & Eddy report. Based on these factual findings, the lower courts concluded that Ventron fraudulently concealed material facts from the Wolfs to their detriment. The trial court limited damages, however, to the recovery of the actual costs of the containment system on the 7.1-acre tract and other costs of abating the pollution. In affirming, the Appellate Division extended damages to include diminution in the fair market value of the premises below the purchase price because of the undisclosed mercury contamination. Both courts awarded to the Wolfs those counsel fees and costs incurred in defending the DEP action.

The trial court concluded that the entire tract and Berry's Creek are polluted and that additional mercury from the tract has reached, and may continue to reach, the creek via ground and surface waters. Every operator of the mercury processing plant

contributed to the pollution; while the plant was in operation, the discharge of effluent resulted in a dangerous and hazardous mercurial content in Berry's Creek. The trial court found that from 1960-74 the dangers of mercury were becoming better known and that Berk, Wood Ridge, Velsicol, and Ventron knew of those dangers. Furthermore, the lower courts concluded that Velsicol so dominated Wood Ridge as to justify disregarding the separate entity of that corporation and imposing liability on Velsicol for the acts of Wood Ridge. Those courts also found that Ventron assumed all of Wood Ridge's liabilities in their merger. Based on those findings, the lower courts concluded that Berk, Wood Ridge, Velsicol, and Ventron were liable for damages caused by the creation of a public nuisance and the conduct of an abnormally dangerous activity. 182 N.J. Super. at 219.

The trial court also determined that the 1977 Spill Act did not impose retroactive liability for discharges of mercury into a waterway of the State. After the entry of the judgment, however, the Legislature amended the act to impose retroactive strict liability on "[a]ny person who has discharged a hazardous substance or is in any way responsible for any hazardous substance" being removed by DEP. See N.J.S.A. 58:10-23.11g(c).

Exercising its original jurisdiction under R. 2:10-5, the Appellate Division found "overwhelming evidence of mercury

pollution in the sediments and waters of Berry's Creek and its substantial and imminent threat to the environment, to marine life and to human health and safety." 182 N.J. Super. at 221. Consequently, the Appellate Division held Wood Ridge jointly and severally liable under the 1979 amendment to the Spill Act.

II

The lower courts imposed strict liability on Wood Ridge under common-law principles for causing a public nuisance and for "unleashing a dangerous substance during non-natural use of the land." 182 N.J. Super. at 219. In imposing strict liability, those courts relied substantially on the early English decision of Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), aff'd, L.R. 3 H.L. 330 (1868). An early decision of the former Supreme Court, Marshall v. Welwood, 38 N.J.L. 339 (Sup. Ct. 1876), however, rejected Rylands v. Fletcher. But see City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 179 (Law Div. 1976) (landowner is liable under Rylands for an oil spill).

Twenty-one years ago, without referring to either Marshall v. Welwood or Rylands v. Fletcher, this Court adopted the proposition that "an ultrahazardous activity which introduces an unusual danger into the community . . . should pay its own way in the event it actually causes damage to others." Berg v. Reaction Motors Div., Thiokol Chem. Corp., 37 N.J. 396, 410

(1962). Dean Prosser views Berg as accepting a statement of principle derived from Rylands. W. Prosser, Law of Torts § 78 at 509 & n.7 (4th ed. 1971).

In imposing liability on a landowner for an ultrahazardous activity, Berg adopted the test of the Restatement of the Law of Torts (1938). See id., §§ 519-20. Since Berg, the Restatement (Second) of the Law of Torts (1977) has replaced the "ultrahazardous" standard with one predicated on whether the activity is "abnormally dangerous." Imposition of liability on a landowner for "abnormally dangerous" activities incorporates, in effect, the Rylands test. Restatement (Second) § 520, comments (d) & (e).

We believe it is time to recognize expressly that the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others. Therefore, we overrule Marshall v. Welwood and adopt the principle of liability originally declared in Rylands v. Fletcher. The net result is that those who use, or permit others to use, land for the conduct of abnormally dangerous activities are strictly liable for resultant damages. Comprehension of the relevant legal principles, however, requires a more complete explanation of their development.

Even in its nascent stages, the English common law recognized the need to provide a system for redressing unlawful interference with a landowner's right to the possession and quiet enjoyment of his land. See 2 W. Blackstone, Commentaries *218; 1 F. Harper & F. James, The Law of Torts, § 1.23 (1956); 2 F. Pollock and F. Maitland, The History of English Law 53 (1895). Trespass and nuisance developed as the causes of action available to a landowner complaining of an unauthorized intrusion on his lands. See Prosser, supra, §§ 13, 86; P. Keeton, "Trespass, Nuisance, and Strict Liability," 59 Colum. L. Rev. 457 (1959); Note, "The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance," 1978 Ariz. St. L. J. 99, 123. In their early forms, predating the development of negligence as a basis for liability, neither trespass nor nuisance required a showing of fault as a prerequisite to liability. See Keeton, supra, at 462-65; Prosser, supra, § 13, at p. 63-64. Historically, any actual invasion that was the direct result of the defendant's act and that interfered with the plaintiff's exclusive possession of his land constituted an actionable trespass, even in the absence of fault. Keeton, supra, at 464-65; see 1 Harper & James, supra, §§ 1.2-1.3. In contrast, nuisance required only an interference with the enjoyment and possession of land caused "by things erected, made,

or done, not on the soil possessed by the complainant but on neighboring soil." 2 Pollock & Maitland, supra, at 53; see W. Seavey, "Nuisance; Contributory Negligence and Other Mysteries," 65 Harv. L. Rev. 984 (1952); Prosser, supra, § 86, at 571-74. The continuing nature of the interference was the essence of the harm, and as with trespass, fault was largely irrelevant. See Prosser, supra, at 576.

Such was the state of the common law in England when, in 1868, the English courts decided Rylands v. Fletcher. In that case, defendants, mill owners in a coal-mining region, constructed a reservoir on their property. Unknown to them, the land below the reservoir was riddled with the passages and filled shafts of an abandoned coal mine. The waters of the reservoir broke through the old mine shafts and surged through the passages into the working mine of the plaintiff. Id. As Dean Prosser explains, the courts were presented with an unusual situation: "[n]o trespass could be found, since the flooding was not direct or immediate; nor any nuisance, as the term was then understood, since there was nothing offensive to the senses and the damage was not continuing or recurring." Prosser, supra, § 78, at p. 505.

The Exchequer Chamber, however, held the mill owners liable, relying on the existing rule of strict liability for damage done

by trespassing cattle. The rationale was stated:

> We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all damage which is the natural consequence of its escape. [Rylands v. Fletcher, L.R. 1 Ex. 265, 279-80 (1866), aff'd, L.R. 3 H.L. 330 (1868)].

On appeal, the House of Lords limited the applicability of this strict liabilty rule to "nonnatural" uses of land. Consequently, if an accumulation of water had occurred naturally, or had been created incident to a use of the land for "any purpose for which it might in the ordinary course of enjoyment of land be used," strict liability would not be imposed. Rylands v. Fletcher, L.R. 3 H.L. 330, 338-39.

Early decisions of this State recognized the doctrine of nuisance as a basis for imposing liability for damages. See, e.g., Cuff v. Newark & N.Y. R. Co., 35 N.J.L. 17, 22 (1870) (when the owner of land undertakes to do work that is, in the ordinary mode of doing it, a nuisance, he is liable for any injuries to third persons, even when an independent contractor is employed to do the work). The former New Jersey Supreme Court, however, became one of the first courts to reject the doctrine of Ryland v. Fletcher. See Marshall v. Welwood, 38 N.J.L. 339 (1876). That Court reached this result by referring to the Exchequer

Chamber's broad formulation of the rule, which extended liability to anything on the land "likely to cause mischief," rather than the narrowed version affirmed by the House of Lords, which limited liability to "nonnatural" use of the land. Writing for the Court, Chief Justice Beasley refused to adopt Rylands because it did not require the challenged activity to be a nuisance per se. Using the example of an alkalai works, however, he distinguished those situations in which the causes of injury partake "largely of the character of nuisances," even when they "had been erected upon the best scientific principles." Marshall v. Welwood, 38 N.J.L. at 342-43; see also Ackerman v. Ellis, 81 N.J.L. 1 (Sup. Ct. 1911) (trees whose branches overhang the premises of another are an actionable nuisance).

The confusion occasioned by the rejection of the Rylands principle of liability and the continuing adherence to the imposition of liability for a "nuisance" led to divergent results. See Majestic Realty Assocs., Inc. v. Toti Contracting Co., 30 N.J. 425, 433-35 (1959); see also McAndrews v. Collerd, 42 N.J.L. 189 (1880) (storing explosives in Jersey City is a nuisance per se, and one who stores them is liable for all actual "injuries caused thereby"). In Majestic Realty, this Court abandoned the term "nuisance per se," 30 N.J. at 434-35, and adopted a rule of liability that distinguished between an "untrahazardous" activity, for which liability is absolute, and

an "inherently dangerous" activity, for which liability depends upon proof of negligence. Id. at 436. In making that distinction, the Court implicitly adopted the rule of landowner liability advocated by section 519 of the original Restatement of Torts, supra.

This rule, while somewhat reducing the confusion that permeated the law of nuisance, presented the further difficulty of determining whether an activity is "ultrahazardous" or "inherently dangerous." See, e.g., Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55 (1960) (discussing in dicta whether aviation should be considered an ultrahazardous activity). Subsequently, in Berg, this Court confirmed strict liability of landowners by noting that it was "primarily concerned with the underlying considerations of reasonableness, fairness and morality rather than with the formulary labels to be attached to the plaintiffs' causes of action or the legalistic classifications in which they are to be placed." 37 N.J. at 405.

More recently, the Restatement (Second) of Torts reformulated the standard of landowner liability, substituting "abnormally dangerous" for "ultrahazardous" and providing a list of elements to consider in applying the new standard. Id., §§ 519-20. As noted, this standard incorporates the theory developed in Rylands v. Fletcher. Under the Restatement analysis, whether an

activity is abnormally dangerous is to be determined on a case-by-case basis, taking all relevant circumstances into consideration. As set forth in the Restatement:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

[Restatement (Second) of Torts § 520 (1977)].

Pollution from toxic wastes that seeps onto the land of others and into streams necessarily harms the environment. See Special Report to Congress, Injuries and Damages from Hazardous Wastes - Analysis and Improvement of Legal Remedies in Compliance with section 301(e) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 By the "Superfund Section 301(c) Study Group" (reprinted as Comm. Print for the Senate Comm. on Envtl. & Pub. Works, Serial No.

97-12, 97th Cong., 2d Sess., 1982) [hereinafter cited as Special Report]. Determination of the magnitude of the damage includes recognition that the disposal of toxic waste may cause a variety of harms, including ground water contamination via leachate, surface water contamination via runoff or overflow, and poison via the food chain. Special Report, supra, at 28. The lower courts found that each of those hazards was present as a result of the contamination of the entire tract. 182 N.J. Super. at 217-18. Further, as was the case here, the waste dumped may react synergistically with elements in the environment, or other waste elements, to form an even more toxic compound. See W. Stopford & L.J. Goldwater, "Methylmercury in the Environment, A Review of Current Understanding," 12 Envtl. Health Persp. 115-18 (1975). With respect to the ability to eliminate the risks involved in disposing of hazardous wastes by the exercise of reasonable care, no safe way exists to dispose of mercury by simply dumping it onto land or into water.

The disposal of mercury is particulary inappropriate in the Hackensack Meadowlands, an environmentally sensitive area where the arterial waterways will disperse the pollution through the entire ecosystem. Finally, the dumping of untreated hazardous waste is a critical societal problem in New Jersey, which the Environmental Protection Agency estimates is the source of more

hazardous waste than any other state. J. Zazzali and F. Grad, "Hazardous Wastes: New Rights and Remedies?," 13 Seton Hall L. Rev. 446, 449 n.12 (1983). From the foregoing, we conclude that mercury and other toxic wastes are "abnormally dangerous", and the disposal of them, past or present, is an abnormally dangerous activity. We recognize that one engaged in the disposing of toxic waste may be performing an activity that is of some use to society. Nonetheless, "the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it." Restatement (Second), supra, comment h at 39.

The Spill Act expressly provides that its remedies are in addition to existing common-law or statutory remedies. N.J.S.A. 58:10-23.11v. Our examination leads to the conclusion, consistent with that of the lower courts, that defendants have violated long-standing common-law principles of landowner liability. Wood Ridge and Berk were at all times engaged in an abnormally dangerous activity - dumping toxic mercury. Ventron remains liable because it expressly assumed the liability of Wood Ridge in the merger. After 1967, Velsicol, as an adjacent landowner, permitted Wood Ridge to dump mercury onto its land. That activity has poisoned the land and Berry's Creek. Even if they did not intend to pollute or adhered to the standards of the

time, all of these parties remain liable. Those who poison the land must pay for its cure.

We approve the trial court's finding that Berk, Wood Ridge, Velsicol, and Ventron are liable under common-law principles for the abatement of the resulting nuisance and damage. The courts below found that the Wolfs are not liable for the costs of cleanup and containment. See 182 N.J. Super. at 227. DEP did not petition for certification on that issue, and we do not consider it on this appeal. Berk and Wood Ridge, not Mr. and Mrs. Wolf, polluted the environment. During their ownership, the Wolfs have not continued to dump mercury and they have been responsible for only a minimal aggravation of the underlying hazardous condition.

III

In this case, we need not impose liability solely on common-law principles of nuisance or strict liability. In a 1979 amendment to the Spill Act, the Legislature imposed strict liability on any person "who has discharged a hazardous substance or is in any way responsible for any hazardous substance" removed by DEP. N.J.S.A. 58:10-23.11g(c). That statute is consistent with the long-standing principle that the Legislature may prohibit activities that constitute a nuisance. See Mayor of Alpine v. Brewster, 7 N.J. 42, 49-50 (1957). At all times

pertinent to this decision, New Jersey statutes have regulated or prohibited activities leading to pollution of the State's waters.

One of the earliest antipollution statutes was "An Act to secure the purity of the public supplies of potable waters in this State," enacted in 1899. L. 1899, c. 41, p. 73. This provision made punishable the discharge, whether directly into state waters, or onto the ice or the banks of any watercourse or tributary thereof, of any "sewage, drainage, domestic or factory refuse, excremental or other polluting matter of any kind whatsoever which, either by itself or in connection with other matter" was capable of impairing the quality of water that might find its way into the water supply of any municipality. Id.

The Legislature supplemented this protection in 1937, by enacting a much broader provision, now codified at N.J.S.A. 23:5-28:

> No person shall allow any dyestuff, coal tar, sawdust, tanbark, lime, refuse from gas houses, or other deleterious or poisonous substance to be turned into or allowed to run into any of the waters of this state in quantities destructive of life or disturbing the habits of the fish inhabiting the same, under penalty of two hundred dollars for each offense. [N.J.S.A. 23:5-28, L. 1937, c. 64, § 2, p. 176].

The 1937 act imposed strict liability on anyone who allowed a pollutant to escape into the waters of the State. State v.

Kinsley, 103 N.J. Super. 190, 192-94 (Law Div. 1968), aff'd, 105 N.J. Super. 347 (App. Div. 1969) (landfill operator held liable under the statute, even in the absence of "guilty knowledge," because the landfill polluted streams); see Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275 (Ch. Div. 1975) (insurer held liable under comprehensive liability policy covering "all sums which the insured shall become legally obligated to pay as damages . . ." because insured, the owner of a tank farm, was strictly liable under statute for cleaning up oil spill even if the spill was caused by a third party). But see State v. American Alkyd Indus., Inc., 32 N.J. Super. 150, 153 (Law Div. 1954) (defendant was not liable under statute when, contrary to instructions, watchman left his post and allowed fuel oil to flow into Berry's Creek).

This statute remained in substantially the same form through 1968 - thus spanning the majority of the period during which Berk operated its mercury processing plant, and the entirety of the period during which Wood Ridge ran it as a Velsicol subsidiary.[1] We agree with the trial court's finding that both

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[1]During this time, the Legislature amended the act once, in 1950. It then read:

> No person shall allow any dyestuff, coal tar, sawdust, tanbark, lime, refuse from gas houses, oil tanks or vessels, vitriol or any of the compounds thereof, or other deleterious or poisonous substance to be turned into or allowed to run into any of the fresh or tidal waters within the jurisdiction of this State in quantities

Berk and Wood Ridge violated the statute by intentionally permitting mercury-laden effluent to escape onto the land surrounding Berry's Creek.

In 1968, the Legislature amended N.J.S.A. 23:5-28 so that it read in pertinent part

> No person shall put or place into, turn into, drain into, or place where it can find its way into any of the fresh or tidal waters within the jurisdiction of this State any deleterious destructive or poisonous substances of any kind . . . . In case of pollution of said waters by substances known to be injurious to fish, birds or mammals, it shall not be necessary to show that the substances have actually caused the death of any of these organisms. [L. 1968, c. 329, p. 979-80].

A 1971 amendment, which is still in effect, added petroleum products, debris, and other hazardous substances of any kind to the list of prohibited substances; it also eliminated the necessity of showing harm to living organisms as a prerequisite to application of the statute. L. 1971, c. 173, p. 663, § 11. Ample evidence supports the trial court's conclusion that, while operating the plant as a Ventron subsidiary from 1968-74, Wood

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destructive of life or disturbing of the habits of the fish or birds inhabiting the same, under a penalty of five hundred dollars ($500.00) for the first offense, and one thousand dollars ($1000.00) for any subsequent offense. [N.J.S.A 23:5-28, as amended, L. 1950, c. 49, § 1, p. 88].

Ridge violated this version of the statute.

The 1971 amendment to N.J.S.A. 23:5-28 was a part of the Water Quality Improvement Act of 1971, N.J.S.A. 58:10-23.1 to -23.10 (L. 1971, c. 173, pp. 660-63, §§ 1-10), which required any person "responsible" for discharging, whether intentionally or by accident, petroleum and hazardous substances to undertake immediate removal of those substances, or to bear the expense of removal authorized by the Department of Environmental Protection (DEP). N.J.S.A. 58:10-23.3, -23.5, -23.7. Only discharges caused by acts of war or acts of God did not occasion strict liability, and even under those circumstances, the person responsible for the substance discharge was obligated to mitigate damages to the extent practicable. N.J.S.A. 58:10-23.10.

"Hazardous substances" were defined quite broadly under the Water Quality Improvement Act to include

> elements and compounds which, when discharged in any quantity into, upon, or in any manner which allows flow and runoff into the waters of this State or adjoining shorelines, presents a serious danger to the public health or welfare, including but not limited to, damage to the environment, fish, shellfish wildlife, vegetation, shorelines, stream banks, and beaches. [N.J.S.A. 58:10-23.3(b)].

By discharging mercury-contaminated effluent from the plant onto the adjacent thirty acres and into Berry's Creek, Wood Ridge violated the act from the time of its enactment in 1971 until

Wood Ridge merged into Ventron and ceased operations in 1974.

The Legislature, in 1976, enacted the Spill Compensation and Control Act of 1977 (Spill Act), N.J.S.A. 58:10-23.11 to -23.11z, as amended, L. 1977, c. 346, § 4. The Spill Act, which is quite comprehensive in its scope, repealed and supplanted the Water Quality Improvement Act. L. 1976, c. 141, § 28. As a result, the State amended its complaint, originally filed in 1976, to allege liability under the Spill Act.

In the Spill Act, the Legislature declared the storage and transfer of hazardous substances to be a hazardous undertaking, constituting a threat to both the environment and economy of the State. N.J.S.A. 58:10-23.11a. The Legislature intended

> to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the 'prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge.' [N.J.S.A. 58:10-23.11a].

As most recently amended, the Spill Act provides that

> The discharge of hazardous substances is prohibited. [N.J.S.A. 58:10-23.11c].
>
> Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the department has removed or is removing pursuant to subsection b. of section 1 of this act shall be strictly liable, jointly and severally, without

regard to fault, for all clean up and removal costs. [N.J.S.A. 58:10-23.11g(c)].

A discharge is statutorily defined as

> . . . any intentional or unintentional action or omission resulting in the release, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substance into the waters of the State or onto lands from which it might flow or drain into said waters outside the jurisdiction of the State. [N.J.S.A. 58:10-23.11b(h)].

Further, as a result of a 1979 amendment, the Spill Act expressly applies to a discharge of a hazardous substance that occurred prior to May 1, 1977, the effective date of the act, "if such discharge poses a substantial risk of imminent damage to the public health or safety or imminent and severe damage to the environment." N.J.S.A. 58:10-23.11(b)(3) (as amended, L. 1979, c. 348, § 4; L. 1981, c. 25, § 1).

Not only has the Legislature granted DEP the power to clean up preexisting spills, but it has also established retroactive strict liability:

> Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the department has removed or is removing pursuant to subsections b. of section 7 of this act shall be strictly liable, jointly and severally without regard to fault, for all cleanup and removal costs. [N.J.S.A. 58:10-23.11g(c), as amended, L. 2976, c. 141, § 8].

As previously mentioned, the 1979 amendment of the Spill Act

became effective subsequent to the judgment of the trial court. Under the "time of decision rule," when legislation affecting a cause is amended while a matter is on appeal, an appellate court should apply the statute in effect at the time of its decision. In re Petition of South Lakewood Water Co., 61 N.J. 230, 248 (1972); see Kruvant v. Mayor of Cedar Grove, 82 N.J. 435, 440 (1980). An exception to that rule obtains if the facts change substantially during the pendency of the appeal. 61 N.J. at 248. Here, however, defendants have not made any showing of additional evidence to support such a change.

In an appropriate exercise of its original jurisdiction under R. 2:10-5, the Appellate Division found that the record overwhelmingly supported the conclusion that the mercury pollution in Berry's Creek and the surrounding area presented a substantial and imminent threat to the environment, thus satisfying the requirement for a retroactive application of the act. Our independent analysis leads us to the same conclusion. Thus, we find Berk, Wood Ridge, and Velsicol liable under the Spill Act. Ventron is liable because it expressly assumed the liabilities of Wood Ridge in their merger.

When considering whether a statute should be applied prospectively or retroactively, our quest is to ascertain the intention of the Legislature. In the absence of an express

declaration to the contrary, that search may lead to the conclusion that a statute should be given only prospective effect. Rothman v. Rothman, 65 N.J. 219, 224 (1974). Conversely, when the Legislature has clearly indicated that a statute should be given retroactive effect, the courts will give it that effect unless it will violate the constitution or result in a manifest injustice. Baldwin v. Newark, 38 N.J.L. 158, 159 (Sup. Ct. 1895); see Gibbons v. Gibbons, 86 N.J. 515, 522-23 (1981); Howard Savings Inst. v. Kielb, 38 N.J. 186, 193 (1962). As noted, the Legislature has expressly declared that the Spill Act should be given retroactive effect.

Retroactivity need not render a statute unconstitutional, Rothman v. Rothman, 65 N.J. at 225, and the Spill Act, not being a criminal provision, is not invalid as an ex post facto law. Furthermore, the due process clause generally does not prohibit retroactive civil legislation unless the consequences are particularly harsh and oppressive. United States Trust Co. v. New Jersey, 431 U.S. 2, 19 n.13, 52 L.Ed.2d 92, 106 n.13 (1977). In the exercise of the police power, a state may enact a statute to promote public health, safety or the general welfare. Rothman v. Rothman, 65 N.J. at 225. Although retroactive application of a statute may impair private property rights, when protection of the public interest so clearly predominates

over that impairment, the statute is valid. Id. In this case, we find that the public interest outweighs any impairment of private property rights.

Further, the Spill Act does not so much change substantive liability as it establishes new remedies for activities recognized as tortious both under prior statutes and the common law. Supra at ___ (slip op. at 13-21, 24-26). A statute that gives retrospective effect to essentially remedial changes does not unconstitutionally interfere with vested rights. Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 381 (1954). On balance, the benefits accorded to the public by the statute outweigh any burden imposed on the polluters.

We note further that Ventron contends that the State, by participating in Ventron's attempt to control pollution at the site, should be estopped from seeking to hold defendants liable for the costs of the cleanup and containment of the mercury. Sometimes by their conduct, public officials may ratify the action of private parties, and that ratification can effect an estoppel. Board of Educ. v. Hock, 38 N.J. 213, 241 (1962). Before ratification will result in an estoppel of public officials, however, it must be shown that the officials knew or should have known of the material facts. Id. That Ventron cooperated with the State in an unsuccessful effort to curb the

pollution of the tract can hardly justify foisting on the public the cost of the cleanup and containment.

The remaining question concerns the propriety of imposing liability under the Spill Act on Ventron and Velsicol for the acts of Wood Ridge. Resolution of this question involves recognition that the limited liability generally inherent in the creation of a corporation presents the potential for avoidance of responsibility for the dumping of toxic wastes by the creation of a wholly-owned subsidiary. Implicit in that consideration is a need to balance the policy in favor of granting limited liability to investors against the policy of imposing liability on polluters for environmental torts. The lower courts struck the balance by piercing Wood Ridge's corporate veil and holding Velsicol liable for the pollution caused by its subsidiary. Although we disagree with the reasoning of those courts, we affirm the finding that Velsicol is responsible for the cleanup of Berry's Creek under the 1979 amendment to the Spill Act.

We begin with the fundamental propositions that a corporation is a separate entity from its shareholders, Lyon v. Barrett, 89 N.J. 294, 300 (1982), and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise. Berle, "The Theory of Enterprise Entity," 47 Colum. L. Rev. 343 (1947); Note, "Piercing the Corporate Veil:

The Alter Ego Doctrine Under Federal Common Law," 95 Harv. L. Rev. 853, 854 (1982); H. Henn, Law of Corporations § 146, p. 250 (2d ed. 1961). Even in the case of a parent corporation and its wholly-owned subsidiary, limited liability normally will not be abrogated. Muller v. Seaboard Commercial Corp., 5 N.J. 28, 34 (1950).

Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil. Lyon v. Barrett, 89 N.J. at 300. The purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, Telis v. Telis, 132 N.J. Eq. 25 (E. & A. 1942), to perpetrate fraud, to accomplish a crime, or otherwise to evade the law, Trachman v. Trugman, 117 N.J. Eq. 167, 170 (Ch. 1934).

Under certain circumstances, courts may pierce the corporate veil by finding that a subsidiary was "a mere instrumentality of the parent corporation." Mueller v. Seaboard Commercial Corp., supra, 5 N.J. at 34-35; see generally Note, "Liability of a Corporation for Acts of a Subsidiary or Affiliate, 71 Harv. L. Rev. 1122 (1958). Application of this principle depends on a finding that the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent. 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 41.1 (Perm. ed. 1974 rev.); see Annot., "Corporations - Torts of a

Subsidiary," 7 A.L.R. 3d 1343, 1355 (1966). Even in the presence of corporate dominance, liability generally is imposed only when the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law. Mueller v. Seaboard Commercial Corp., 5 N.J. at 34-35; see generally Note, "Liability of a Parent or Affiliate," supra, 71 Harv. L. Rev. at 1123; 1 Fletcher Corporations, supra, § 41.1.

In holding that Velsicol is liable for the acts of Wood Ridge, the lower courts found it "immaterial" that Wood Ridge was not undercapitalized and that it did not engage exclusively in business with Velsicol. 182 N.J. Super. at 225. Those courts found dispositive the facts that Velsicol created Wood Ridge for the sole purpose of acquiring and operating Berk's mercury processing business and that, as the trial court found, "Velsicol personnel, directors, and officers were constantly involved in the day-to-day business" of Wood Ridge. By themselves those conclusions are not sufficient to support the further conclusion that the intrusion of Velsicol into Wood Ridge's affairs reached the point of dominance. Furthermore, it appears that Velsicol incorporated Wood Ridge for a legitimate business purpose. Contrary to the implication of the trial court opinion, it is proper to establish a new corporation for the sole purpose of acquiring the assets of another corporation and continuing its

business. We cannot conclude that Velsicol incorporated Wood Ridge for an unlawful purpose. See Rippel v. Kaplus, 124 N.J. Eq. 303, 304 (Ch. 1938).

Although it would be inappropriate to pierce Wood Ridge's corporate veil by applying the traditional common-law doctrine, liability of Velsicol may be predicated upon the 1979 amendment to the Spill Act. As amended, the Spill Act provides: "Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance . . . shall be strictly liable, jointly and severally, without regard to fault, for all clean up and removal costs." N.J.S.A. 58:10-23.11g(c) (emphasis added).

The phrase "in any way responsible" is not defined in the statute. As we have noted previously, however, the Legislature intended the Spill Act to be "liberally construed to effect its purposes." N.J.S.A. 58:10-23.11x. The subsequent acquisition of land on which hazardous substances have been dumped may be insufficient to hold the owner responsible. Ownership or control over the property at the time of the discharge, however, will suffice. See State Dep't of Envtl. Protection v. Exxon Corp., 152 N.J. Super. 464, 470-74 (Ch. Div. 1977). From 1960 to 1974, while Wood Ridge was a Velsicol subsidiary, Velsicol could have controlled the dumping of mercury onto its own thirty-three-

acre tract. By permitting Wood Ridge to use that tract as a mercury dump, Velsicol made possible the seepage of hazardous wastes into Berry's Creek. In addition, Velsicol was the sole shareholder of Wood Ridge and all members of the Wood Ridge Board of Directors were Velsicol employees. Velsicol personnel, officers, and directors were involved in the day-to-day operation of Wood Ridge. In addition to constant involvement in Wood Ridge's activities, Velsicol permitted the dumping of waste material on the thirty-three-acre tract. When viewed together, those facts compel a finding that Velsicol was "responsible" within the meaning of the Spill Act for the pollution that occurred from 1960 to 1968.

Given the extended liability of the Spill Act, we conclude that the Legislature intended that the privilege of incorporation should not, under the circumstances that obtain here, become a device for avoiding statutory responsibility. A contrary result would permit corporations, merely by creating wholly-owned subsidiaries, to pollute for profit under circumstances when the Legislature intended liability to be imposed.

The question remains to what extent Velsicol should share with Ventron the costs of containing and cleaning up the contaminated area. Wood Ridge, as a successor landowner that purchased all of the assets and continued the activities of Berk,

was liable for the damage caused by its own operations and those of Berk. See New Jersey Dep't of Transp. v. PCS Resources, Inc., 175 N.J. Super. 447 (Law Div. 1980); State v. Exxon Corp., 151 N.J. Super. 464 (Ch. Div. 1977); Note, "Successor Landowner Liability for Environmental Torts: Robbing Peter to Pay Paul?," 13 Rutgers L.J. 329, 334-42 (1982). Through the merger of Wood Ridge into Ventron, the latter corporation assumed all of Wood Ridge's liabilities, including those arising out of the pollution of Berry's Creek. See N.J.S.A. 14A:10-6(c). Ventron, however, did not assume Velsicol's liability.

Pursuant to the mandate of the Spill Act, see N.J.S.A. 58:10-23.11g(c), Berk, Wood Ridge, Velsicol, and Ventron are jointly and severally liable without regard to fault. Only Ventron and Velsicol remain in existence, and we affirm that portion of the Appellate Division judgment that holds them jointly and severally liable for the cleanup and removal of mercury from the Berry's Creek area.

IV

Finally, we consider the issues raised by the Wolfs' cross-claim against Ventron, in which the Wolfs alleged fraudulent nondisclosure in the sale of realty. As noted by the trial court, the elements necessary to prove fraudulent concealment on the part of a seller in a real estate action are:

the deliberate concealment or nondisclosure by the seller of a material fact or defect not readily observable to the purchaser, with the buyer relying upon the seller to his detriment. Weintraub v. Krobatsch, 64 N.J. 445, 455 (1974); Berman v. Gurwicz, 189 N.J. Super. 89 (Ch. Div. 1981), aff'd, 189 N.J. Super. 49 (App. Div. 1983), cert. den., ___ N.J. ___ (1983). The trial court found that Ventron knew of a latent defect, gross mercury pollution in the soil, but intentionally failed to disclose that fact to the Wolfs. Furthermore, the court found that the contamination was not readily observable by the Wolfs and that the Wolfs relied upon the nondisclosure to their detriment. The Appellate Division determined that those findings were supported by credible evidence. 182 N.J. Super. at 227. We agree, and affirm the judgment in favor of the Wolfs on the cross-claim.

While no proofs on damages had yet been adduced below, that issue having been set aside for separate trial, both lower courts commented upon limitations and inclusions ultimately applicable to the award. Specifically, both courts found that "the cost of the containment system may be recoverable, as well as the legal fees incurred by the Wolfs in defense of the action brought against them by DEP." 182 N.J. Super. at 228. We disagree.

Just last year we noted: "[t]he general rule pertaining to

counsel fees is that 'sound judicial administration will best be advanced' if litigants bear their own counsel fees except in those situations designated by R. 4:42." Right to Choose v. Byrne, 91 N.J. 287, 316 (1982) (quoting Gerhardt v. Continental Ins. Co., 48 N.J. 291, 301 (1966)). Consistent with this policy, legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, court rule, or contract. Cohen v. Fair Lawn Dairies, Inc., 86 N.J. Super. 206 (App Div. 1965), aff'd, 44 N.J. 450 (1965); Jersey City Sewerage Auth. v. Housing Auth. of Jersey City, 70 N.J. Super. 576 (Law Div. 1961), aff'd, 40 N.J. 145 (1963). No such predicate for an award of attorney's fees to the Wolfs exists in this case. Accordingly, we reverse the judgment of the Appellate Division insofar as it permits the awarding of counsel fees to the Wolfs.

As modified, the judgment of the Appellate Division is affirmed.

Justices Clifford, Schreiber, Handler and Garibaldi join in this opinion.

Chief Justice Wilentz and Justice O'Hern did not participate.